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Kate B. Enroth

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COMMENTS

UNITED STATES v. GEORGESCU: SPECIAL AIRCRAFT JURISDICTION IN THE UNITED STATES

I. INTRODUCTION

The question of who should have jurisdiction over the prosecution of crimes committed on board aircraft in flight has been answered in a variety of confusing and disparate forms. Traditional bases of jurisdiction under international law are helpful tools to answer the question when the prosecuting state has a traditional recognizable local or national interest in the assertion of criminal jurisdiction.¹ In the case of aircraft in international flight, the question is more difficult to answer because the justification for prosecution does not always fit the form of a traditional national interest. Prosecuting crimes committed on board a foreign aircraft in international flight may require a nation to exercise extraterritorial jurisdiction over the crime.² Further-

1. A brief explanation of the traditional bases of jurisdiction is provided as an introduction. The territorial theory allows for jurisdiction over offenses committed within a state's territory. The nationality theory grants jurisdiction based upon the nationality of the offender. The protective theory recognizes jurisdiction over offenses affecting a state's sovereign interests. The passive personality theory extends jurisdiction to the state of nationality of the victim of the offense. The universal theory allows jurisdiction over particular universally recognized crimes to any nation. Another basis of jurisdiction is the place of landing theory which grants jurisdiction to the nations from which the aircraft either departed or landed with the offender on board the aircraft. The aircraft's state of registration provides one other basis for jurisdiction. For a more detailed explanation of the traditional bases of jurisdiction in international law, see *infra* notes 13-26 and accompanying text (Section II).

2. Consider the example of a United States citizen who poisons a British citizen while both are on board an Air India flight from Rome to Copenhagen. It is unknown exactly where the poison was administered, or where the British citizen died. If the United States, England, or India chose to assert jurisdiction over the offense, this would be an example of a state's exercise of extraterritorial jurisdiction since the crime did not occur over any of the states' territorial airspace. Allan Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509 (1967) [hereinafter Mendelsohn].

more, there is often more than one interested state which could assert jurisdiction. It is most difficult to determine which state *should* prosecute.

Congress extended traditional United States jurisdiction in 1970 when it created "special aircraft jurisdiction" for the federal courts over certain criminal acts.³ The need for such a broad scope of jurisdiction developed because of the growing number of crimes committed on board aircraft as international air travel increased.⁴ This jurisdiction extends beyond previously accepted jurisdictional boundaries prescribed by the principles of international law. The United States special aircraft jurisdiction incorporates the territorial theory of jurisdiction with the place of landing theory.⁵ Under the special aircraft jurisdiction statute, a United States federal court may exercise jurisdiction over certain crimes committed on board any aircraft which lands at its scheduled destination, or had its last point of departure, within the United States.⁶ Therefore, this includes jurisdiction over crimes occurring on any aircraft over any part of land or sea, regardless of the nationality of the victim or offender if the aircraft departed from or lands in the United States.

3. 49 U.S.C. § 1301 (1991). The statute provides in pertinent part:

(38) The term "special aircraft jurisdiction of the United States" includes —

(d) any other aircraft outside the United States —

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States;

(ii) having "an offense," as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; or;

(iii) regarding which an offense as defined in subsection (d) or (e) of article 1, section 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, September 23, 1971) is committed if the aircraft lands in the United States with an alleged offender still on board[.]

Id.

49 U.S.C. § 1472(k)(1) (1991) provides:

Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, chapter 109A, or 2111 of such Title 18 shall be punished as provided therein.

4. See Mendelsohn, *supra* note 2, at 532.

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporter's note 9 (1987) [hereinafter RESTATEMENT (THIRD)] suggests that special aircraft jurisdiction is based upon either the effects principle or universal jurisdiction. The effects principle incorporates activity outside a state but which has a substantial effect within the state. It is considered an extension of the territorial theory. *Id.* at § 402 cmt. d.

6. See *infra* note 9.

*United States v. Georgescu*⁷ is the first case to use this special aircraft jurisdiction to prosecute a foreign national for a criminal act against another foreign national while on board a foreign aircraft which landed in the United States.⁸ A Romanian defendant was indicted for sexual abuse and attempted sexual abuse of a nine-year-old Norwegian girl while on board a Scandinavian Airlines aircraft which landed in New York.⁹ Although the United States exercise of jurisdiction over this crime was correctly held by the United States District Court for the Eastern District to be in accord with international law and consistent with congressional authorization,¹⁰ the wisdom of such prosecution is unfounded.¹¹

This Comment begins by analyzing the origin of special aircraft jurisdiction based upon international law and United States legislative authority. This Comment then questions the propriety of such an exercise of jurisdiction in light of the foreign policy ramifications and potential effects upon our judicial system. This Comment then suggests and discusses solutions to potential problems arising out of prosecutions like *Georgescu*, including a set of formal guidelines for the federal prosecutors, the use of extradition, and a written certification process.

7. *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989).

8. Judge Weinstein stated it was a "case of first impression" in *Georgescu*, *id.* at 913. For examples of other United States courts' application of special aircraft jurisdiction to materially different situations, see *infra* note 82.

9. The statute provides in part:

(c) Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 2241 (1991).

"Sexual act" is defined as:

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2245 (1991).

Defendant ultimately pled to abusive sexual contact, 18 U.S.C. § 2244 (1991). Interview with Linda B. Lakhdir, Assistant United States Attorney, in Brooklyn, N.Y. (Oct. 31, 1990) [hereinafter Interview].

10. *Georgescu*, 723 F. Supp. at 912.

11. Judge Weinstein also had reservations about the prosecution, "[d]espite this court's reservations about the wisdom of further prosecution in this country, it lacks the power to refuse jurisdiction on equitable grounds." *Id.* at 922.

II. DEVELOPMENT OF SPECIAL AIRCRAFT JURISDICTION

Which state should have jurisdiction to prosecute crimes committed on board aircraft in international flight? An answer could be based upon one of several factors, among them: the location of the aircraft at the time when the crime was committed; the nationality of the accused or the victim; the nation in which the aircraft is registered; and the nation in which the plane originated or landed. There is rarely one state with exclusive jurisdiction. Instead, international law is premised on the idea of concurrent, or shared, bases of jurisdiction.¹² With shared jurisdiction, however, comes the problem of deciding whether a particular state should assert jurisdiction over a particular offense. The answer to the question of which state should exercise jurisdiction requires an analysis of traditional bases of jurisdiction, as well as an examination of the policy issues at stake with each choice.

A. *Traditional Bases of International Jurisdiction*

There are five widely accepted bases of jurisdiction under international law.¹³ As defined in the frequently cited *Harvard Research in International Law* in 1935,¹⁴ they are: (1) the territorial theory which allows for jurisdiction over acts committed within a nation's territorial boundaries;¹⁵ (2) the nationality the-

12. In 1927, the Permanent Court of International Justice, an international tribunal established by the League of Nations, explicitly affirmed the idea of concurrent jurisdiction in the S.S. "Lotus" decision when it stated that:

Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser A) No. 10, reprinted in BURNS H. WESTON, ET. AL., *INTERNATIONAL LAW AND WORLD ORDER; A PROBLEM-ORIENTED COURSEBOOK* 82 (2d ed. 1990) [hereinafter WESTON].

13. United States courts have accepted these five traditional bases. See, e.g., *United States v. Yunis*, 681 F. Supp. 896, 899-900 (D.D.C. 1988) (five traditional bases of jurisdiction under international law); *Laker Airlines v. Sabena, Belgian World Airlines*, 731 F.2d 909, 935 (D.C. Cir. 1984) (customary bases of jurisdiction include territoriality and nationality); *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979) (United States can have jurisdiction over criminal acts under the protective or objective territoriality theory).

14. Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935).

15. The territorial theory is the most widely accepted basis for the exercise of juris-

ory which grants jurisdiction based upon the nationality of the offender;¹⁶ (3) the protective theory which encompasses extraterritorial acts which threaten a nation's security or basic governmental function;¹⁷ (4) the passive personality theory which allows the exercise of jurisdiction when the victim is a citizen of the state;¹⁸ and (5) the universal theory which is based upon the concept that every nation has jurisdiction over certain crimes deemed to be of universal concern.¹⁹

Historically, international jurisdiction over crimes has centered upon the territorial theory.²⁰ The emphasis of the nation-state in political theory encouraged the acceptance of territorial boundaries as a basis for jurisdictional authority.²¹ A nation's

diction. RESTATEMENT (THIRD), *supra* note 5, at § 402 cmt. c. Criminal law is generally based upon the premise of a state's need to keep the peace within its own territory and exert control over law enforcement.

16. The nationality theory is the other principal basis for jurisdiction because it involves the powers of a state to prescribe law with respect to its nationals outside, as well as within, the state's territory. RESTATEMENT (THIRD), *supra* note 5, at ch. 1, 237.

17. The protective theory recognizes the right of a state to punish a limited number of offenses committed outside the state's territory but which are directed solely against the state and threaten to impair the integrity of government functions. Such offenses include espionage, violation of immigration or customs law, falsification of official documents, or counterfeiting the state's seal or currency. RESTATEMENT (THIRD), *supra* note 5, at § 402 cmt. f.

18. This theory, historically less widely supported in the United States, allows a state to assert jurisdiction over offenses committed against its own nationals. RESTATEMENT (THIRD), *supra* note 5, at § 402 cmt. g, reporter's note 3. This theory, while an inverse of the nationality theory, tends to be more controversial because of its impact on the sovereignty of other states. RESTATEMENT (THIRD), *supra* note 5, at ch. 1, 273.

19. The universal theory recognizes that international law permits any state to apply its laws and assert jurisdiction over the offender of universal crimes regardless of any links of territory or nationality which the state has with the crime and the offender. Crimes of universal concern include piracy, slave trade, genocide, and war crimes. RESTATEMENT (THIRD), *supra* note 5, at § 404; *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) [hereinafter Randall].

20. *See, e.g.*, Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1114-23 (1982) [hereinafter Blakesley]. Chief Justice Marshall stated what is considered a classic formulation of the United States territorial theory:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . to the same extent in that power which would impose such restriction. All exceptions, therefore . . . must be traced up to the consent of the nation itself.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

21. Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (1990) [hereinafter Note, *Constructing the State*].

boundaries define the political and legal powers of the state. It is both appropriate and necessary that a state establish a penal code for itself and the power to prosecute violations of its penal laws. The effects principle, which is part of the territorial theory, includes activity which occurs outside the state's territorial boundaries, but which has, or is intended to have, a substantial effect within the state.²²

The other traditional bases of jurisdiction are extensions of the territorial theory. The protective theory, for example, incorporates the concept that conduct which occurs outside a nation can have the same effects upon that nation as conduct within the nation's territory. Thus, prosecution of certain extraterritorial crimes is necessary to protect a nation's security and governmental functions within its territory. The passive personality theory, while generally less accepted than other bases of jurisdiction, is sometimes used in connection with certain criminal laws.²³ The theory that a nation should have jurisdiction over a criminal act committed against one of its nationals makes sense if considered within the scope of a nation's territorial authority. An analogy could be made that a citizen outside his or her own nation carries jurisdictional authority in the same way a flagship of the nation does.²⁴ The nationality theory, which is less controversial than the passive personality theory, operates on the same principle that a nation has an interest in jurisdiction over crimes committed by its nationals as an extension of territorial

22. The territorial theory includes extraterritorially committed crime based upon a crime's subjective or objective effects within the state. If a constituent element of the crime was committed within the United States, jurisdiction typically can be exerted. This theory is called the subjective territoriality theory. The objective territoriality theory, on the other hand, allows a state to exert jurisdiction over extraterritorial conduct which causes effects within the state's territorial boundaries. Blakesley, *supra* note 20, at 1118-23.

23. The United States enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2331, which relies upon the passive personality theory. Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987). The act expands United States extraterritorial jurisdiction over foreign nationals engaging in international terrorism that injures a United States citizen. Only those offenses intended to coerce, intimidate, or retaliate against the United States are included in the act. *Id.* at 606-08; see also RESTATEMENT (THIRD), *supra* note 5, at § 402 reporter's note 3.

24. A state may regulate activity on board vessels or aircraft registered in that state and foreign vessels within the state's territorial waters or airspace. RESTATEMENT (THIRD), *supra* note 5, at § 402 cmt. h, reporter's note 4.

authority.²⁵

These theories provide a state with extraterritorial jurisdiction in certain traditional situations.²⁶ The problem, however, with regulating conduct on board aircraft is that while a state may have jurisdiction over the offense committed on board, that state typically may choose not to assert jurisdiction because it may lack any genuine interest in the prosecution of the crime. The more significant issue is which state should have priority when there is concurrent jurisdiction. There is no traditional answer in international law to this question.

B. Theories of Aircraft Jurisdiction

Various theories of aircraft jurisdiction have been in existence since 1902.²⁷ They evolved from the traditional bases of international jurisdiction. The "state of registration" theory grew from the accepted "law of the flag" theory for maritime vessels.²⁸ The state of registration theory allows a nation to exercise jurisdiction over activity occurring upon its own vessels or aircraft.²⁹ Problems with this theory are that other nations might have greater interests affected by the conduct.³⁰ A second theory also follows the territorial principles of international law, that is, whichever state in whose air space the offense occurred has jurisdiction over such offense. Clearly this poses the some-

25. See RESTATEMENT (THIRD), *supra* note 5, at § 402 reporter's note 1.

26. The United States Supreme Court first held that there was no constitutional bar to the extraterritorial application of United States penal laws in *United States v. Bowman*, 260 U.S. 94 (1922). But the extraterritorial jurisdictional reach of a nation is, in fact, never entirely free from controversy. While the principle of a nation regulating conduct outside its territory is generally accepted, it is the length of the jurisdictional reach and the nature of the offense covered by the reach which provokes controversy. The International Bar Association Conference in 1989 focused on widespread concern regarding the rapidly expanding scope of international jurisdiction over product and environmental liabilities. *IBA On Product/Environmental Liability*, WORLD LOSS REPORT, Oct. 20, 1989. Meanwhile, the debate over the extraterritorial application of United States law in the economic sphere, like the antitrust and securities areas, has also grown unproductive. See Spencer W. Waller, *Bringing Meaning to Interest Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925 (1991).

27. NICHOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 329-30, nn. 12-13 (1981) [hereinafter MATTE].

28. The United States Supreme Court recognized the international acceptance of the law of the flag theory in *United States v. Flores*, 289 U.S. 137 (1937).

29. Mendelsohn, *supra* note 2, at 513.

30. Another problem is that a passenger choosing an airline typically selects a particular airline because of price, seat availability, time of departure, or other such practical reasons, none of which relate to a selection of a state's laws and procedures. Mendelsohn, *supra* note 2, at 513.

times impossible dilemma of determining where the offense occurred.³¹ A third theory, called the "place of landing" theory, gives jurisdiction to the state in which the aircraft lands after an offense is committed.³² Again, other states might have greater interests than the state of first landing.³³ The fourth theory is a combination of the three theories, called the "mixed" theory, which incorporates their strengths and avoids their weaknesses.³⁴ The mixed theory grants multiple and concurrent jurisdiction to all of the states directly affected and includes the nationality of the offender.³⁵

United States special aircraft jurisdiction is based on the place of landing theory and grants the United States jurisdiction when any aircraft departs from or lands in the United States. The principles of international law support this creation of a special aircraft jurisdiction. The Restatement (Third) of the Foreign Relations Law of the United States explicitly states that the United States assertion of special aircraft jurisdiction would not be unreasonable in light of a combination of the effects principle and the universal principle.³⁶ The Restatement, however, limits its approval of special aircraft jurisdiction to prosecutions of serious crimes of force.³⁷

31. Mendelsohn, *supra* note 2, at 514.

32. Mendelsohn, *supra* note 2, at 514.

33. One other disadvantage with this theory is that the place of landing might be selected on an emergency basis, or a stop where the offender had never intended to disembark, therefore the offender potentially had no notice of the possibility of being subject to that state's laws. Nevertheless, this theory has significant advantages from a procedural view point because the evidence, witnesses, victim, and offender are all present. Mendelsohn, *supra* note 2, at 514.

34. Mendelsohn, *supra* note 2, at 514.

35. Mendelsohn, *supra* note 2, at 514. This mixed theory is what the international community has accepted through international conventions and treaties.

36. RESTATEMENT (THIRD), *supra* note 5, at § 403 reporter's note 9.

37. RESTATEMENT (THIRD), *supra* note 5, at § 403 reporter's note 9:

"Special maritime" and "special aircraft" jurisdiction of the United States.
 . . . Such jurisdiction could reach offenses that do not involve acts in United States territory or airspace, acts by United States nationals, or acts aboard a United States registered vessel or aircraft — for instance, a hijacking over the high seas by a national of State X of an aircraft of State Y bound for the United States. Whether such jurisdiction is based on the effects principle, § 402(1)(c), or a kind of universal jurisdiction, § 404, exercise of criminal jurisdiction in these circumstances would not seem unreasonable under Subsection (2) [§ 403], especially in the case of a serious offense, for example one involving the use of force.

Note that the crimes included in the special aircraft jurisdiction are all crimes of force. See *infra* note 84.

C. *The Path of Special Aircraft Jurisdiction*

1. International Conventions on Aircraft Jurisdiction

The international community has endorsed a method of prosecuting offenders under municipal criminal laws extended by different nations to criminal acts committed on board aircraft in international flight.³⁸ Through international conventions and multilateral and bilateral treaties, nations are extending their municipal criminal codes to aircraft in international flight.³⁹ Another method of prosecuting offenders of aircraft crime would be to establish an international criminal code and an international forum in which to enforce and prosecute international crimes. While this proposal arouses much intellectual discourse, it receives little actual support from nations.⁴⁰ It generally cannot be considered a viable option in the near future.⁴¹

The Tokyo Convention (Convention), held in 1963, is the origin of the United States special aircraft jurisdiction, as well as the starting point for the international community's acceptance of special aircraft jurisdiction.⁴² The Convention's principal objective was the maintenance of safety and good order on board

38. MATTE, *supra* note 27, at 331-32.

39. See Convention on Offences and Certain other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention], reprinted in LOUIS HENKIN, ET. AL., BASIC DOCUMENTS SUPPLEMENT TO "INTERNATIONAL LAW: CASES AND MATERIALS" 296 (2d ed. 1987) [hereinafter HENKIN]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133, reprinted in HENKIN, *supra*, at 303; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151, reprinted in HENKIN, *supra*, at 308. The numerous extradition treaties between countries are evidence of the acceptability of municipal law as applied to an international situation. *E.g.*, Valery Shupilov, *Legal Assistance in Criminal Cases and Some Important Questions of Jurisdiction*, 15 CASE W. RES. J. INT'L L. 127 (1983).

40. See, *e.g.*, M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983) [hereinafter Bassiouni]; Daniel H. Derby, *An Analytic Framework for International Criminal Law: Realism and Interest Realignment*, 1 TOURO L. REV. 57 (1985); Robert A. Friedlander, *The Foundations of International Criminal Law: A Present-Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983) [hereinafter Friedlander].

41. See Bassiouni, *supra* note 40, at 34, 37.

42. Tokyo Convention, *supra* note 39. Drafting of the treaty began in 1950 when the Legal Committee of the International Civil Aviation Organization (ICAO) first considered the legal status of aircraft. Six years later the first draft was written in Geneva. After several revisions, the fourteenth session of the ICAO took place August 28-September 15, 1962 in Rome. The final version was amended and ratified August-September 1963. MATTE, *supra* note 27, at 334. Norway and Romania were both parties to the Tokyo Convention. HENKIN, *supra* note 39, at 296.

aircraft.⁴³ The international community recognized the international implications of increasing aircraft crime and the resulting conflicts of jurisdiction.⁴⁴

The Convention applies to all offenses against penal law and other acts which may not be penal offenses but jeopardize the safety, good order, and discipline on board an aircraft.⁴⁵ Debate at the Convention focused on whether such offenses and acts would include those which did not actually threaten the safety of the aircraft itself.⁴⁶ The delegates decided that those acts would be covered by the three categories created at the Convention. The first category includes those that threaten the safety of the aircraft; the second, those that jeopardize the good order and discipline on board; and the third, the most significant of all, those offenses which violate penal law.⁴⁷

The jurisdiction established and approved at the Convention incorporates the historical proposals of aircraft jurisdiction⁴⁸ and traditional jurisdictional bases in international law.⁴⁹ The Convention authorizes jurisdiction to the state of registration of the aircraft.⁵⁰ More significantly, though, it permits the

43. MATTE, *supra* note 27, at 337.

44. PETER B. KEENAN, ET AL., SHAWCROSS AND BEAUMONT ON AIR LAW 701-02 (3d ed. 1966) [hereinafter KEENAN].

45. Tokyo Convention, *supra* note 39. Article 1 provides:

1. This Convention shall apply in respect of:

a) offences against penal law;

b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

46. The United States representative was reluctant to endorse such a potentially broad scope. Nevertheless, his colleagues were not, and the Convention voted down proposals to narrow the scope to offenses threatening aircraft safety or to serious offenses. 1 International Civil Aviation Organization, *International Conference on Air Law, Tokyo, August-September 1963*; KEENAN, *supra* note 44, at 702-03.

47. Tokyo Convention, *supra* note 39, at art. 1. This third category encompasses offenses which do not threaten safety or good order on board the aircraft and would include the crime of sexual abuse. See Mendelsohn, *supra* note 2, at 521.

48. See *supra* notes 27-35 and accompanying text.

49. See *supra* notes 13-25 and accompanying text.

50. Tokyo Convention, *supra* note 39. Article 3 provides:

1) The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2) Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3) This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

exercise of *any* jurisdiction as authorized by national law.⁵¹ The next issue is which state, if any, has priority to assert jurisdiction, given the authorization of potentially concurrent and overlapping jurisdiction. The Convention did not resolve this issue,⁵² nor has any later convention prioritized interested states' jurisdiction.⁵³

Two later conventions, the Hague Convention in 1970 and the Montreal Convention in 1971, concerning offenses committed on board aircraft, did not change the types of offenses covered by or the jurisdiction authorized by the Tokyo Convention.⁵⁴ Instead, the later conventions narrowed their focus to the rapidly growing international problems of terrorist and hijacking crimes on board aircraft.⁵⁵ These conventions were never intended to supersede any previous treaties and, instead, built upon the principles established by the Tokyo Convention.⁵⁶

2. United States Legislative Authority for Aircraft Jurisdiction

The United States Congress first addressed the issue of aircraft jurisdiction in 1952 when it amended the "Special Maritime and Territorial Jurisdiction of the United States" to include aircraft belonging to the United States.⁵⁷ Such jurisdiction was too limited,⁵⁸ however, and Congress in 1961 created extra-

51. See *supra* note 50.

52. KEENAN, *supra* note 44, at 704; Mendelsohn, *supra* note 2, at 516-17.

53. One author has argued that the Tokyo Convention sanctioned a *de facto* system of priority in favor of the state in which the offender is apprehended since no other interested state has priority over the state of landing. Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft. Part 1: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381, 396 (1974).

54. MATTE, *supra* note 27, at 370-71.

55. Because of the narrowing focus, defendant incorrectly argued that the Tokyo Convention itself applied only to terrorist and hijacking crimes. Defendant's Memorandum on Motion to Dismiss at 8, *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989) (89 CR 258). For discussion of defendant's arguments, see *infra* notes 71-74 and accompanying text (Section III A).

56. The world's attention was increasingly focused on terrorism and hijacking because of the grave difficulties involved in cooperation with other nations in the capture and prosecution of terrorists. See MATTE, *supra* note 27, at 371.

57. 18 U.S.C. § 7(5) (1991). The statute previously covered only maritime vessels. But when *United States v. Cordova*, 89 F. Supp. 298 (E.D.N.Y. 1950), held that United States aircraft were not considered vessels within the meaning of the statute, Congress added what is now paragraph 5 of section 7 in order to include United States aircraft within United States jurisdiction over crimes occurring over the high seas. See Mendelsohn, *supra* note 2, at 530-31.

58. Jurisdiction was allowed only when the offense was out of any particular state's

territorial jurisdiction over certain crimes committed on board aircraft in air commerce.⁵⁹ The bill was drafted mainly for terrorist and hijacking crimes, but other serious crimes were included.⁶⁰ Therefore, from its inception, special aircraft jurisdiction was not created solely for the purpose of prosecuting terrorists and hijackers. It is also clear that Congress was amply aware of the broad reach of the legislation, but recognized the need for federal coverage of crimes on board all aircraft in order to contribute to the administration of justice and the promotion of air commerce.⁶¹

The legislative definition of air commerce did not encompass the full jurisdiction permitted under the Tokyo Convention.⁶² Thus, the 1970 legislation enacted to implement the United States ratification of the Tokyo Convention replaced air commerce with the jurisdictional definition of "special aircraft jurisdiction."⁶³ This path of legislative history illustrates congressional intent to assert jurisdiction over foreign aircraft which may have no other connection with the United States except by

jurisdiction. 18 U.S.C. § 7(1) (1991).

59. Congress amended the Federal Aviation Act of 1958 in 1961. Federal Aviation Act Amendments of 1961, Pub. L. No. 87-197, 75 Stat. 466 (1961). The primary purpose of the amendments was to extend federal criminal laws to acts committed on board aircraft. Congress specifically included foreign aircraft in air commerce which originated or landed in the United States:

The language of this legislation, coupled with the definition of "air commerce" in the Federal Aviation Act of 1958, will operate to make certain of its provisions applicable not only to acts committed on American-flag aircraft in flight in air commerce over foreign countries but also to such acts committed on foreign aircraft in flight in air commerce over foreign countries, but only if such aircraft are engaged in flights originating at or destined to points in the United States . . . The committee feels that it is necessary and appropriate for the legislation to have this broad coverage if it is to operate as an effective deterrent to crime and promote safety in air commerce.

H.R. REP. No. 958, 87th Cong., 1st Sess. (1961).

60. Crimes included were aircraft piracy, assault, maiming, embezzlement and theft, murder, manslaughter, attempt to commit murder or manslaughter, rape, carnal knowledge of females under the age of 16, robbery and burglary, indecent exposure, carrying weapons on board, and imparting or conveying false information. H.R. REP. No. 958, 87th Cong., 1st Sess. (1961).

61. *Id.* at 2564-65.

62. Mendelsohn, *supra* note 2, at 538.

63. H.R. REP. No. 91-1535, 91st Cong., 2d Sess. (1970). Special aircraft jurisdiction of the United States included the following aircraft while in flight —

(c) any other aircraft (i) within the United States or (ii) outside the United States which has its next scheduled destination or last point of departure in the United States provided that in either cases it next actually lands there.

H.R. No. 91-1535.

place of landing, as well as congressional intent to cover crimes unrelated to the safety of the aircraft.⁶⁴

III. *UNITED STATES v. GEORGESCU*

A. *Facts and Procedural History*

On March 25, 1989, a nine-year-old Norwegian girl was sexually abused by Victor Georgescu, a Romanian citizen, while watching the in-flight movie on board a Scandinavian Airlines aircraft from Oslo, Norway to New York City.⁶⁵ The girl and her family boarded Scandinavian Airlines Flight 911 in Oslo, Norway as did the defendant Georgescu.⁶⁶ During the flight, the girl was seated next to Georgescu so that she would have a better view of the in-flight movie.⁶⁷ As the airplane flew over the Atlantic Ocean, Georgescu sexually abused the girl by placing his hand beneath her underwear on her genitals.⁶⁸ When the airplane landed at John F. Kennedy International Airport in Queens, New York, Georgescu was arrested and subsequently indicted for engaging and attempting to engage in a sexual act with a child not yet twelve years of age, in violation of 18 U.S.C. § 2241(c)⁶⁹ while aboard an aircraft within the special aircraft jurisdiction of the United States.⁷⁰

Georgescu moved to dismiss the indictment for lack of jurisdiction.⁷¹ He asserted that the United States did not have jurisdiction to prosecute a Romanian citizen for an alleged assault on

64. One author has argued that there has been insufficient attention to the constitutional authority of recent extraterritorial United States law enforcement. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989). Nevertheless, the author did not question the constitutionality of special aircraft jurisdiction, so long as United States jurisdiction which is based on the presence of the accused is directly related to the offense charged. *Id.* at 893.

65. Government's Memorandum in Opposition to Defendant's Motion to Dismiss at 3, *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989) (89 CR 258).

66. Prior to moving to Norway with her Norwegian mother and her American stepfather, the girl had lived in the United States for several years. The girl holds a United States green card which allows her legal residency in the United States. *Id.* Georgescu is a radio navigator for TAROM, the state-owned airline of Romania. *Id.*

67. *Id.*

68. The girl ran back to her mother after the assault hysterically crying. The parents complained to the flight attendants who told the captain of the aircraft. The captain notified Kennedy Airport. Both Port Authority Police and agents from the Federal Bureau of Investigation were at Kennedy Airport when the airplane landed. Interview, *supra* note 9.

69. See *supra* note 9.

70. See *supra* note 3.

71. Defendant's Memorandum at 1, *Georgescu* (89 CR 258).

a non-United States citizen on board a foreign aircraft while over non-United States territory.⁷² Georgescu argued that the special aircraft jurisdiction statute did not cover the alleged crime of sexual abuse by a foreigner of another foreigner on board a foreign aircraft over foreign airspace.⁷³ He further argued that established principles of international law denied the United States jurisdiction over this crime.⁷⁴

In response, the federal prosecutor from the United States Attorney's office of the Eastern District of New York argued that jurisdiction was properly asserted under the special aircraft jurisdiction statute.⁷⁵ The prosecutor maintained that the legislative history of the special aircraft jurisdiction statute confirms congressional intent to include a variety of crimes which occur on board foreign aircraft.⁷⁶ The prosecutor also argued that the principles of international law supported United States assertion of jurisdiction in this case.⁷⁷

The United States District Court for the Eastern District of New York denied defendant's motion for dismissal of the indictment for lack of jurisdiction.⁷⁸ Defendant filed an interlocutory appeal which was dismissed due to a lack of subject matter jurisdiction to hear the appeal.⁷⁹ In July 1990, defendant Georgescu

72. *Id.* at 2.

73. In a convoluted argument of statutory construction, defendant attempted to argue that the statute's authorization of jurisdiction required that the crime was additionally an offense as defined by the Hague or Montreal Conventions, which would therefore preclude the charged crime since the Hague and Montreal Conventions addressed only terrorist and hijacking crimes. *Id.* at 7-9.

74. Defendant argued first that the flagship, or aircraft in this case, had exclusive jurisdiction over conduct occurring on the high seas or airways. Second, defendant argued that the foreign country had not consented to United States criminal jurisdiction over crimes on board aircraft. Third, since there were no demonstrable effects or nexus between the crime and the United States, there was no constitutional justification for jurisdiction over the crime. *Id.* at 10-12.

75. The Assistant United States Attorney argued that the plain meaning of 49 U.S.C. § 1301(d)(i) clearly covers the alleged crime. Defendant's grammatical construction of the statute was incorrect because the crime need not be one covered by the Tokyo, Hague, or Montreal Conventions as specified in subsections (ii) and (iii). Government's Memorandum at 10, *Georgescu* (89 CR 258).

76. The Assistant United States Attorney demonstrated that Congress intended to preserve, generally, the safety and security of the aircraft and all those aboard it. *Id.* at 11.

77. *Id.*

78. *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989).

79. Interview, *supra* note 9. Appeals to federal courts of appeals from United States district courts must be from final decisions of district courts. 28 U.S.C. § 1291 (1991). Therefore, since the jurisdictional decision was a non-final judgment, the court of appeals had no basis for a determination.

entered a plea of *nolo contendere*.⁸⁰ Georgescu was sentenced to approximately five hundred hours of community service to be served in Romania.⁸¹

B. The Court's Decision

The court declared the application of special aircraft jurisdiction to the indictment to be a case of first impression.⁸² The court correctly held that the United States assertion of jurisdiction was proper because the sexual abuse was committed within the special aircraft jurisdiction created by Congress.⁸³ The court found that Congress had intended to criminalize, and give federal courts jurisdiction over, certain specified acts committed within this special aircraft jurisdiction.⁸⁴ The court found that the creation of the special aircraft jurisdiction was constitutional and within congressional power.⁸⁵ Moreover, such an assertion of jurisdiction did not violate international law.⁸⁶

The court's opinion focused on the legislative history of the statute by examining preceding United States statutes governing aircraft crime. The court found that the legislative record of earlier aircraft jurisdiction statutes indicated congressional intent

80. Interview, *supra* note 9. This type of plea may be entered by leave of the court to a criminal indictment. With this plea, defendant has not admitted or denied the criminal charges, he has simply not contested them.

81. Interview, *supra* note 9.

82. *Georgescu*, 723 F. Supp. at 913. Special aircraft jurisdiction has been used many times in the United States, but never with similar facts. *See generally* United States v. Clark, 893 F.2d 1277 (11th Cir. 1990) (attempted murder on flight from Panama to New York); United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989) (assaulting and intimidating a stewardess on a flight from New York to Puerto Rico); United States v. Meeker, 527 F.2d 12 (9th Cir. 1975) (intimidating pilot and passengers on board a flight from Miami to San Francisco); United States v. Anderson, 503 F.2d 420 (6th Cir. 1974) (attempted manslaughter on flight from Pennsylvania to Ohio).

83. *Georgescu*, 723 F. Supp. at 914. *Cf.* Chumney v. Nixon, 615 F.2d 389, 391 (6th Cir. 1980) (the court interpreting a civil case found that, "Congress . . . has undertaken to apply federal law to American (and other) aircraft while such aircraft are . . . returning from a foreign country directly to an airport in the United States").

84. *Georgescu*, 723 F. Supp. at 914-18. Crimes currently enumerated in 49 U.S.C. § 1472(k)(1) include the following sections from Title 18 of the United States Code: 113 (assault within maritime and territorial jurisdiction); 114 (maiming); 661 (steal or purloin personal property of another); 662 (receiving stolen property); 1111 (murder); 1112 (manslaughter); 1113 (attempt to commit murder or manslaughter); 2111 (robbery and burglary); and chapter 109A, which includes sections 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), and 2244 (abusive sexual conduct).

85. *Georgescu*, 723 F. Supp. at 918.

86. *Id.* at 919-21.

to cover acts committed on foreign aircraft.⁸⁷ It was also clear to the court that the jurisdiction also encompassed crimes not relating to hijacking crimes.⁸⁸ Judge Weinstein stated that:

The history of the statutes regarding crimes committed aboard aircraft makes plain the congressional design to criminalize and create jurisdiction over specified acts committed in non-United States airspace aboard foreign carriers bound for and landing in the United States, including aggravated sexual abuse . . .⁸⁹

The court rejected defendant's argument that special aircraft jurisdiction applies only to offenses covered by the Hague and Montreal Conventions committed on board foreign aircraft.⁹⁰

The court found that international law placed no restriction upon such an exercise of jurisdiction.⁹¹ The Tokyo Convention approved of criminal jurisdiction which was exercised in accordance with national law.⁹² The special aircraft jurisdiction was, after all, specifically created in order to comply with the Tokyo Convention.⁹³ The court stated that "the Tokyo Convention's primary goal was to encourage nations to exercise jurisdiction over [aircraft] crimes."⁹⁴

The court also rejected defendant's suggestion that the special aircraft jurisdiction was unconstitutional.⁹⁵ The court stated that there were ample constitutional bases for the exercise of this jurisdiction, including the Commerce Clause and the Necessary and Proper Clause to enforce United States treaty obligations.⁹⁶

87. See *supra* note 83.

88. See *supra* note 84.

89. *Georgescu*, 723 F. Supp. at 914-15.

90. Judge Weinstein stated that, "[t]here is nothing in the legislative history to indicate that Congress meant to qualify the broad jurisdiction over crimes aboard foreign aircraft that it conferred in the 1961 and 1970 criminal provisions." *Id.* at 917.

91. *Id.* at 919-20.

92. See *supra* note 50.

93. *Georgescu*, 723 F. Supp. at 919.

94. *Id.* at 920.

95. *Id.* at 918.

96. *Id.* Judge Weinstein stated that the Commerce Clause, Section 8 of Article 1, allowed Congress to regulate commerce and that maintaining safety and security on board aircraft encourages air commerce between the United States and other nations. He cited the Necessary and Proper Clause, Section 8 of Article 1, which grants Congress the authority to make laws necessary to enforce and implement United States treaty obligations with other nations. Additionally, Congress has the authority to, "define and punish Piracies and Felonies committed upon the High Seas, and Offences against the Law of

IV. RAMIFICATIONS OF THE *GEORGESCU* DECISION

In *United States v. Georgescu*,⁹⁷ the United States was in the unusual position of prosecuting a foreigner for a crime he committed against another foreigner on board a foreign aircraft while flying over the Atlantic Ocean.⁹⁸ This was a case of first impression, even for the Eastern District of New York in which John F. Kennedy International Airport is located.⁹⁹ The authority of the court to uphold the special aircraft jurisdiction has been shown.¹⁰⁰ Nevertheless, if *Georgescu* signals a trend toward future prosecutions of crimes in similar situations, there remain some fundamental problems with the continued exercise of such jurisdiction.

A. *Burdensome Duty on the United States Federal Courts System*

The most practical effect of the broad jurisdiction granted by Congress to the federal courts could prove to be the burdensome duty on the federal system, including both the courts and the prosecutors. While the number of cases with foreign elements similar to *Georgescu* is apparently small, the time spent on these cases with such international ramifications is considerably more than on a "typical" case. Here, a prosecutor from the United States Attorney's office had to interview the passengers and crew, which, due to the international nature of the flight, involved people from all over the world. Moreover, the burden on the victim and potential witnesses is significantly increased because of the need to travel internationally in order to testify.¹⁰¹ Problems with finding, gathering, and introducing evi-

Nations," from Article 1, Section 8, Clause 10. Jurisdiction over the "high airways" certainly is analogous to the "high seas." *Id.* at 918-19.

97. *Id.* at 912.

98. *Id.*

99. *Id.* at 913. It is surprising that since 1970, when special aircraft jurisdiction was first conceived, there have been no other cases in the United States with similar foreign players and circumstances. In an interview, the Assistant United States Attorney who handled the case stated that these types of cases rarely went as far as this case did, implying that alternative solutions are available for handling crimes with such jurisdictional conflicts. Interview, *supra* note 9.

100. See *supra* notes 12-96 and accompanying text (Sections II and III).

101. In fact, in this case, the victim and her family were initially willing to help in the prosecution of the defendant. However, as time dragged on in the case, and as trial approached, the family became less interested in cooperating. A plea was acceptable to the Assistant United States Attorney partly because of the family's growing reluctance.

dence are multiplied when dealing with foreigners and other nations.¹⁰² The United States Department of State, the Department of Justice's Office of International Affairs, as well as the Romanian and Norwegian officials all had to be consulted immediately in this case.¹⁰³ These factors, considered with the circumstances of the crime, will not always justify the United States prosecution when the United States interests are as minimal as they are in this case.¹⁰⁴

If the actual logistics are not that serious, the theoretical burden is more troubling. It is questionable if the federal government should spend its valuable, and limited, time and resources on the prosecution of crimes when there are several other potential and justifiable locations for prosecution.¹⁰⁵ It also is not clear where the offender would serve his or her sentence.¹⁰⁶ These are some of the issues which must be resolved if *Georgescu* is a sign of further prosecutions using special aircraft jurisdiction in similar contexts.

B. Damaging Effects on United States Relations with Other Nations

The United States must also concern itself with the effects of the assertion of special aircraft jurisdiction upon its relations with other nations.¹⁰⁷ When the United States applies its laws extraterritorially, asserting criminal jurisdiction over extraterritorial conduct, other nations' interests are frequently affected and offended, and conflicts often arise.¹⁰⁸ The traditional bases

Interview, *supra* note 9.

102. While foreign documents and evidence are covered by Federal Rules of Criminal Procedure, the gathering, certification, and introduction of such evidence entails a more detailed authentication process than for United States evidence. See 18 U.S.C. §§ 3491-94, 3505-07 (1991).

103. Interview, *supra* note 9.

104. The decision to prosecute any case always entails a discretionary choice, but it seems obvious that the facts of this case were more compelling to the prosecutor than if, for example, the victim had "only" been robbed.

105. *But see infra* notes 120 & 127.

106. Georgescu spent 24 days in a United States jail awaiting bail and received a three year sentence from Judge Weinstein. The sentence was suspended except for the 24 days in jail, and, instead, Georgescu was given 500 hours of community service to be done in Romania. Interview, *supra* note 9.

107. RESTATEMENT (THIRD), *supra* note 5, at ch. 1, 236 (discussion of United States overreach of extraterritorial jurisdiction).

108. In this case, Romania strongly opposed United States jurisdiction and asserted the innocence of Georgescu. Relationships with Romania were already politically strained at the time of the incident. Interview, *supra* note 9.

of jurisdiction rely upon the territorial theory. Thus, a state's competence to prescribe laws is inextricably attached to a state's sovereignty. Such a relationship between a state's sovereignty and its prescriptive competence encourages jurisdictional conflict in the area of prosecuting international crime. In most instances, like *Georgescu*, when there are several possible bases of jurisdiction and locations of prosecution, several different states' sovereign interests are affected. The lack of any precise prioritizing of states' jurisdictional interests only adds to the tangle of sovereignty, jurisdiction, and prosecution.

The application of United States law abroad has already caused considerable controversy.¹⁰⁹ While such extraterritorial reach may have legislative and constitutional authority, the foreign policy implications are considerable and far from settled. The United States Congress created special aircraft jurisdiction over certain particular crimes¹¹⁰ without sufficient attention to our national interest, or lack of it, in the prosecution of these crimes. Such a wide scope of jurisdiction might be considered yet another example of a form of American imperialism, despite the open door to jurisdiction resulting from the Tokyo Convention.¹¹¹

One other serious concern is the potential prosecution of United States citizens abroad for criminal conduct under a similar jurisdictional authority.¹¹² The potential prosecution of our

109. See *Increased Use of Extraterritoriality Could Threaten International Business*, Antitrust & Trade Reg. Rep. (BNA) No. 1334, at 532 (Oct. 1, 1987) (noting increased frequency and intensity of conflicts of international jurisdiction in international business); *IBA on Product/Environmental Liability*, THE FINANCIAL TIMES, Oct. 20, 1989 (focusing on expanding liabilities in product and environmental litigation and problems with international jurisdiction and procedure); RESTATEMENT (THIRD), *supra* note 5, at ch. 1, 282-303 (controversy concerning economic regulatory laws of the United States).

110. See *supra* note 84 for current list.

111. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 280-81 (1990) (Justice Brennan, J., dissenting). Justice Brennan wrote:

Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes. The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three biggest exports are now "rock music, blue jeans, and United States law." (citation omitted)

Id.

112. Note, *Constructing the State*, *supra* note 21, at 1277.

citizens under a foreign penal code merely because of a foreign aircraft's place of landing is unsettling. While the crimes within the United States special aircraft jurisdiction are *malum in se*, there is no guarantee that other states will act in the same way.

C. *The Internationalization of Municipal Law*

The invocation of special aircraft jurisdiction in *Georgescu* is an example of the internationalization of municipal law. One commentator has theorized that international criminal law is the product of two legal disciplines: "the criminal aspects of international law and the international aspects of national criminal law."¹¹³ The difference between the two disciplines is significant. Combatting international crimes like terrorism and hijacking, essentially those of the first legal discipline, was the impetus for the various treaties under which special aircraft jurisdiction was invoked. But these treaties also include those crimes of the second legal discipline.

A fundamental problem with internationalizing municipal law is that the world as a whole has not recognized all crimes in the same manner.¹¹⁴ Proof of this lack of unity is the very limited theoretical framework for the universal theory of jurisdiction.¹¹⁵ Therefore, if the practice of prescribing municipal laws internationally were to continue along the same path as the United States special aircraft jurisdiction, there might be a great potential for conflict among foreign nations.

V. SOLUTIONS TO THE POTENTIAL EFFECTS OF THE *GEORGESCU* DECISION

The United States and other nations have significant concerns about the promotion of safety and good order on board aircraft and the prosecution of offenders of dangerous acts. In order to facilitate these goals of prosecuting aircraft crime, the international community agreed upon a wide scope of jurisdiction. But such a broad authorization of jurisdiction has led to the recurring problem of *which* nation should assert jurisdiction over the crime. In order to properly answer that question, the Assistant United States Attorney must weigh United States in-

113. Bassiouni, *supra* note 40, at 27.

114. Friedlander, *supra* note 40, at 24.

115. Only a limited number of crimes are universally condemned. RESTATEMENT (THIRD), *supra* note 5, at § 404; see also Randall, *supra* note 19.

terests against those of other concerned nations. The *Georgescu* decision is problematic because it fails to present a clear assessment of United States interests in prosecuting the crime.¹¹⁶

A. The Role of Prosecutorial Discretion and Suggested Guidelines

Prosecutorial discretion plays a central role in the enforcement of justice and such discretion cannot be abrogated. But the Department of Justice should establish for the United States Attorney's office a formal method of assessing United States interests when considering prosecution of a crime under the special aircraft jurisdiction which has no connection to this country except for the statute's jurisdiction. The significant foreign policy implications warrant more careful guidance.

There are presently no applicable formal, written guidelines issued by the Department of Justice or the Department of State for a situation like that in *Georgescu*.¹¹⁷ In *Georgescu*, the decision was made in conjunction with the Department of State and the Department of Justice's Office of International Affairs, but earlier decisions are always made before such consultative advice can be obtained.¹¹⁸ Written guidelines would aid the prosecutor in the early decision making process of whether to go forward with a case.

Suggested guidelines for an Assistant United States Attorney are in the form of a series of questions.¹¹⁹ The answers to the questions provide a framework for the prosecutor to evaluate whether the United States jurisdiction is justified in each partic-

116. Judge Weinstein, while upholding the special aircraft jurisdiction statute, questioned, "the wisdom of further prosecution in this country . . ." *United States v. Georgescu*, 723 F. Supp. 912, 922 (E.D.N.Y. 1989).

117. Here, the Assistant United States Attorney on call on March 25, 1989, responded to the authorities at Kennedy Airport in a routine manner. The decision to go forward with the indictment and prosecution, however, was made in consultation with the new Assistant United States Attorney (Lakhdar) assigned the case, the Chief of General Crimes in the Eastern District, the Department of State, and the Department of Justice's Office of International Affairs. These offices were involved in the case from the start, and it is doubtful whether the case would have gone forward without Washington's approval. Interview, *supra* note 9.

118. Interview, *supra* note 9.

119. The Department of Justice has guidelines for international antitrust enforcement. United States Department of Justice, Antitrust Division, *Antitrust Enforcement Guidelines for International Operations* (Nov. 10, 1988), reprinted in 4 Trade Reg. Rep. (CCH) para. 13, 109.

ular case.¹²⁰

1. Using the principles of international law and international treaties, what other states could assert jurisdiction over the offense? Are those states interested in investigating the offense and prosecuting the alleged offender?

2. Are there states which oppose United States jurisdiction over the offense? Would those opposing states satisfactorily investigate the offense and prosecute the offender?

3. What is the United States interest in prosecuting the offense? Is the United States interest based upon a belief that no other state will conduct an equitable investigation?

4. Would a conflict occur with another state if the United States claims jurisdiction over the offense? Is the conflict based upon legitimate reasons which the United States would assert if the situation were reversed? What would be the effect on the political and economic relations between the United States and the opposing state?

5. Is the offense a crime in the other interested or opposing states? Is it an extraditable offense under current extradition treaties between the United States and the other state?

6. Was the offense committed against an individual or a group of people? Did the offense significantly disrupt the order on board or the safety of the aircraft?

Finally, after using the suggested guidelines, the prosecutor should consider the variety of factors suggested by the Restatement (Third) of the Foreign Relations Law of the United States that limit a state's prescriptive jurisdiction.¹²¹ The Restatement

120. While recognizing the importance of United States jurisdiction in situations like *Georgescu* in order to detain the alleged offender, gather evidence, and take witness statements, the decision to prosecute is another important step, one which the suggested guidelines are intended to aid.

121. RESTATEMENT (THIRD), *supra* note 5, at § 403:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the line of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the

correctly suggests that the ultimate limitation upon international jurisdiction to prescribe law, and prosecute, should be the reasonableness of the jurisdiction.¹²²

B. *Extradition as an Alternative to Prosecution*

The interrelation between the role of prosecutorial discretion and extradition provides an important solution to the potential effects resulting from prosecutions in line with *Georgescu*. Legal assistance between nations, like extradition, plays a vital role in the enforcement of international law.¹²³ Extradition is the process by which a person charged with or convicted of a crime against the laws of one state and found in another state is returned to the former state by the latter state. International law does not obligate one state to extradite an individual in the absence of a treaty; and in the United States, extradition is governed by federal law.¹²⁴ Extradition depends upon jurisdictional theories because generally one state will not extradite an individual unless that state recognizes the basis for jurisdiction

regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id.

122. RESTATEMENT (THIRD), *supra* note 5, at § 403 cmt. a.

123. International criminal law depends upon "indirect enforcement," such as extradition, as its enforcement system due to the failure of the international community to establish any "direct enforcement" system like an international criminal court. Bassiouni, *supra* note 40, at 33 n.21.

124. LOUIS HENKIN, ET. AL., INTERNATIONAL LAW: CASES AND MATERIALS 885-86 (2d ed. 1987).

asserted by the requesting state.¹²⁵ Thus, the international community's acceptance of special aircraft jurisdiction is significant.¹²⁶

Extradition is a proper alternative because it is the ultimate accommodation of the requesting state's interests. By definition, the prosecutor, by beginning the process of extradition, has assessed the United States interests in the prosecution of the crime and compared them with the requesting state's interests.¹²⁷

C. Written Certification by the Attorney General for Prosecution

One additional solution is to require written certification of prosecution from the Attorney General.¹²⁸ Such a requirement would best ensure that the foreign policy ramifications have been thoroughly considered. Such a certification by the Attorney

125. This concept has been called the "special use" of "double criminality." Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 4 UTAH L. REV. 685, 743 (1984) [hereinafter Blakesley, *Conceptual Framework*]. The double criminality principle is that the offense charged must be an offense in both the requesting state as well as in the requested state. Other requirements might be that the offense have a minimum term of one year in both countries. WESTON, *supra* note 12. The special use principle requires reciprocity of the jurisdictional basis in addition to the offense. Blakesley, *A Conceptual Framework*, *supra*, at 743-44.

126. See *supra* notes 12-26 and accompanying text (Section II A).

127. Here, the United States was in the position of prosecuting the case because no other state would. Apparently Norway had no interest in seeking the extradition of Georgescu. Interview, *supra* note 9. A sexual offense upon a minor is an extraditable offense according to the United States extradition treaty with Norway. Extradition Treaty, June 9, 1977, U.S.-Nor. 31 U.S.T. 5621, 5634. An agreement with Romania was unacceptable to the prosecutor because of that country's steadfast belief in Georgescu's innocence. Interview, *supra* note 9. Additionally, the extradition treaty between the United States and Romania includes only "carnal knowledge of children under the age of twelve years" as an extraditable offense, which would probably not include the offense in question. Extradition Treaty, July 23, 1924, U.S.-Rum. 44 Stat. 2020; Supplementary Extradition Treaty, November 10, 1936, U.S.-Rum. 50 Stat. 1349. Therefore, since extradition was not a realistic alternative here, the prosecutor felt compelled to proceed with the prosecution. Interview, *supra* note 9.

128. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 has such a requirement. 18 U.S.C. section 2332 (1991):

(d) LIMITATION ON PROSECUTION — No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government of a civilian population.

Id. For discussion of this act, see *supra* note 23.

General would necessarily result from discussions and meetings with representatives from all interested states. As this Comment has demonstrated, special aircraft jurisdiction has too many international implications for it to be asserted without due weight given to each respective states' concerns. It may be in the United States best interests to have the Attorney General, who has the knowledge and power to assess United States interests and other states' interests, make the ultimate decision.

VI. CONCLUSION

Special aircraft jurisdiction represents a strong United States interest in the prosecution of crimes committed on board aircraft, regardless of the nationality of the victim, the offender, or the aircraft. The maintenance of good order and safety on board all aircraft is a compelling interest. But because of the number of other states' entitled to exercise jurisdiction, conflicts over United States exercise of jurisdiction will continue to occur.

The Department of Justice has failed to establish a framework for its prosecutors in which to clearly analyze United States interests in the prosecution of a particular crime in relation with other states' interests in prosecution. The result is that United States relations with other nations are unnecessarily harmed. Moreover, the increased burden on the federal system is not justified if United States interests are not substantial. The solutions proposed would provide some help in what will always be a murky situation. Jurisdiction cannot be forced upon any nation, but neither can jurisdiction be too quickly asserted.

Kate B. Enroth

